

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CALVIN LETROY HUNTER §

v. § Cause # 4:10-cv-00778

RICK THALER §

**MOTION TO REQUEST AN EVIDENTIARY HEARING ON ISSUE OF
MENTAL RETARDATION PURSUANT TO SPECIAL HABEAS RULE 8**

TO THE HONORABLE JUDGE OF SAID COURT:

I.

NOW COMES, Calvin Hunter, currently held illegally in the Texas Department of Corrections – Institutional Division, through his undersigned court appointed attorney, Patrick F. McCann, and files this request for an evidentiary hearing pursuant to Texas Code of Criminal Procedure Article 11.07 § 3(d).

II.

Dr. Denkowski, the State's primary witness in the trial of Calvin Hunter, has now been officially reprimanded by the Texas Medical Board. His methods for determining whether an individual was retarded have been found to be medically unsound and they have been rejected by the Texas mental health establishment. This means the jury received false and misleading material sponsored by the State, information critical to the jury's determination on both the *Atkins v. Virginia* issue, and the ultimate decision on death. Since the State essentially sponsored false expert testimony, it is a violation of due process under the Fourteenth Amendment and the Eighth Amendment's proscription against cruel or unusual punishment to have such a death sentence stand. This Honorable Court should grant this motion.

III.

A. If the petition is not dismissed at a previous stage in the proceeding, the judge, after the answer and the transcript and record of state court proceedings are filed, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require.

B. 1. When designated to do so in accordance with 28 U.S.C. 636(b), a magistrate judge may conduct hearings, including evidentiary hearings, on the petition, and submit to a judge of the court proposed findings of fact and recommendations for disposition.

2. The magistrate judge shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

3. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

4. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate judge.

C. If an evidentiary hearing is required, the judge shall appoint counsel for a petitioner who qualified for the appointment of counsel under 18 U.S.C. 3006(a) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and

preparation. These rules do not limit the appointment of counsel under 18 U.S.C. 3006(a) at any stage of the case if the interest of justice so requires.

Respectfully submitted,

s/_____

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CERTIFICATE OF CONFERENCE

I attempted to reach the Asst. AG on this matter for the State via phone and but was not able to, but I believe he would be unopposed to this motion.

s/_____

Patrick F. McCann

CERTIFICATE OF SERVICE

I certify that true and correct copy of the foregoing was delivered to the Office of the Attorney General, , P.O. Box, Capitol Station, Austin, Texas 78711, via first class mail on April 29, 2011.

s/_____

Patrick F. McCann

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ORDER SETTING DATE FOR EVIDENTIARY HEARING

IT IS ORDERED that an evidentiary hearing on the Applicant's 11.07 post-conviction
writ of Habeas Corpus is hereby set for _____, on the _____ day of
_____, 20____, in the courtroom of the _____ in Harris County, Texas.

PRESIDING JUDGE

DATE